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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 68

DELVAILLE H. THEARD, PETITIONER

versus

UNITED STATES OF AMERICA

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITIONER

ISSUES PRESENTED

(1) The state court holding, that insanity is no excuse for professional misconduct, affords due process, and should be adopted in a federal disbarment action, considering that the profession of law is charged in the highest measure with a public interest, and that this Court has recently decided there is no vested right to practice law, the loss of the privilege being merely incidental to the right of the court to protect itself, and hence society, as an instrument of justice.

(2) A disbarment action filed four years after an attorney returns to practice is not stale, in the absence

of a showing of prejudice resulting from the previous delay; furthermore, the state rule is conclusive here.

STATEMENT

We agree that petitioner is entitled to an adjudication of his constitutional rights on the question decided by the Louisiana court, but we do not acquiesce in his unorthodox presentation of the issues.

In the state disbarment proceedings petitioner confessed to embezzlement and breach of trust committed against a client, Olga Wexler, in that on January 2, 1935 he forged her signature to a promissory note and on August 14, 1935 he appropriated to his own use the proceeds of the sale of said note. In resolving a purely legal issue, the state court held that his alleged insanity at the time these acts were committed was no defense in a disbarment action, or, in other words, that proof of intent or wilfulness was not essential considering the nature and real objectives of disbarment. Not content to have decided by this Court the restricted issue of whether this state holding offends due process, petitioner argues that he was actually insane when these crimes were committed, which exculpates him from any ethical responsibility, and that he was sane at the time the state disbarment action was taken, as well as when this federal rule was filed. Petitioner further represents that in another earlier decision the Supreme Court of Louisiana exculpated him on account of insanity and then, disbarred him for committing the same act.¹ This is not an accurate representation, because the court was dealing in each instance with an entirely different subject matter.

¹ Petitioner says "the acts charged to petitioner in the two cases were the same" (pet. brief, p. 14).

Petitioner speaks of a "serious mental breakdown resulting from overwork," he quotes copiously from letters lauding him for his part-time service as a law professor, and expressing regret that his nervous condition necessitated his relinquishing his assignment—purely self-serving declarations beyond the scope of the state decision, and merely calculated to fortify his contention that he was actually insane when the offense was committed, yet petitioner opposed the Committee's appearance here because it would not "fairly limit its argument to the issues included in the present record" (pet. opposition, p. 1).

The Committee's contention that the evidence in the state hearing did not establish his insanity was treated thus by the state court (72 So. (2) 315):

"Petitioner herein (the above named Committee) excepts to that part of the Commissioner's report which holds that respondent 'was suffering under an exceedingly abnormal condition, some degree of insanity.' It alleges, in its exception, 'that, on the contrary, the evidence abundantly shows that he deliberately and consciously, and with malice ~~of~~ forethought, attempted to simulate and feign, and did ~~not~~ ^{so} simulate and feign, the genuine signature of the alleged makers of the mortgage note, which he now admits was forgery.' However, in view of the conclusion reached and hereinabove declared, we need not determine the Committee's exception."

We deny unreservedly that petitioner was insane when he committed the particular crimes for which he was disbarred,² or that any state court has so held, or that any

² His application for previous certiorari (Vide p. 5), refused when directed against the state decree, contained a similar inaccuracy.

state court has held he was insane at the time the other alleged embezzlements or breaches of trust were perpetrated. Nor has any such conclusion been reached in this federal proceeding.

By a denial of petitioner's application for writs when directed against the state court decree³ his disbarment in Louisiana is final and irretrievable. Should this Court hold that a defense of insanity when the misconduct occurred is sufficient to defeat a disbarment action in the federal courts, this cause should be returned to the court below in order for the question of petitioner's sanity *vel non* to be adjudicated. The distinction, therefore, between petitioner's contention that his insanity has been established and our position that it has merely been pretermitted by the state court is at once apparent.

Petitioner proclaims that he has abundantly established that his sanity is now fully restored and that there is now lacking the primary object of disbarment, which is to protect the courts, the profession, and society itself. Considering the public interest which permeates a matter of this kind, we can only say that this record does not contain the quality of proof necessary to reach that conclusion.

SUMMARY OF ARGUMENT.

(1) The choice of who shall stand at the bar rests with the state. In interpreting its constitution and rules governing disbarment, the state court has determined that an attorney who confessed to forgery and embezzlement committed against his own client is guilty of misconduct warranting disbarment, although, for the

³ *Theard v. Louisiana State Bar Association*, 348 U.S. 832, 75 S. Ct. 54, 99 L.Ed. 656.

purpose of the holding, it was conceded he was insane when the acts were committed. That petitioner is guilty of misconduct under the law and public policy of the state is conclusive here. This Court's denial of *certiorari* against the state decree has made his disbarment complete and irretrievable in the state court.

(2) Considering vital matters of public policy—that the profession is charged in the highest measure with a public interest; that this Court has recently held an attorney has no vested right in his license, rather that the court should protect itself, and hence society, as an instrument of justice; that the objective of disbarment is not to punish the attorney, whose loss of status is incidental and consequential,—the Louisiana rule disbarring petitioner, notwithstanding the court conceded his insanity for the purpose of the decision, does not offend due process. There is nothing unique in imposing civil liability without actionable fault, where the public interest is paramount.

(3) As the state court has not decided petitioner was actually insane when he committed the crimes for which he was disbarred, if petitioner's defense is held to be valid in the federal courts, the case must be returned for adjudication of the issue of his actual insanity when the offense occurred. The disbarring authority, state, or federal, must determine that issue for itself on satisfactory evidence; the same is true with reference to the issue of his present sanity. Petitioner must fail in his effort to have any court conclude he was actually insane when he committed the offense for which he was disbarred because a *nisi prius* court held he was insane at the time he was brought to trial on an entirely different charge.

(4) A state disbarment action filed four years after petitioner returned to active practice is not stale, considering the protracted period petitioner claims to have been hospitalized. The state decision on both the law and the facts being adverse to petitioner, the issues are foreclosed here. Since petitioner has shown no prejudice by the delay, the federal rule should be the same as that ordained by the state.

ARGUMENT

We reply as follows to petitioner's argument as catalogued in his brief:

(1)

The Supreme Court of Louisiana has exclusive original jurisdiction involving misconduct of members of the bar; the constitution does not limit the grant to wilful misconduct; there was no lack of jurisdiction *rationae materiae* in the state court.

Petitioner confessed to the misconduct for which he was disbarred. A plea that his alleged insanity at the time of the offense effected an ouster of the court's substantive power to hear the case was denied.⁴ (*Louisiana State Bar Association v. Theard*, 222 La. 328, 62 So. (2) 501, 503.) That holding is conclusive here. Furthermore, the argument is otherwise untenable.

The state court, with plenary authority and jurisdiction to construe its own rules for disbarment, has held petitioner to have been guilty of misconduct, sufficient to justify disbarment, notwithstanding in making its decision the court conceded his insanity at the time the

⁴This point that the state court lacked jurisdiction *rationae materiae* was not saved in petitioner's application for certiorari, and will not be considered. Rules S.Ct. U.S. Rule 23(c).

misconduct was committed. Petitioner complains here that, under the law of Louisiana, the offenses of forgery and embezzlement, to which he confessed at the disbarment hearing, do not constitute misconduct under the law of Louisiana in view of his particular situation.⁵ That issue has been settled adversely to him by the Supreme Court of Louisiana, and that court's interpretation of their own rules is conclusive here (*Barsky v. The Board of Regents*, 347 U.S. 442, 32 L.Ed. 829, 74 S.Ct. 650, 654). The responsibility for choice as to the personnel of its bar rests with Louisiana (*In Re: Summers*, 325 U.S. 561, 65 S.Ct. 1307, 89 L.Ed. 1795).

(2)

The state rule in the disbarment decision, which decision pertained to a particular forgery and embezzlement, is not at variance with an earlier decision in which the court made reference, in passing, to petitioner's insanity at the time of trial for another embezzlement and which delayed his criminal prosecution therefor, the other embezzlement being separate and distinct from the offense for which he was disbarred. The two decisions deal with entirely different issues.

The *Wexler* forgery for which petitioner was disbarred occurred in 1935. Significantly, all of his offenses consisted of breaches of a fiduciary trust, the symptoms of his alleged insanity being solely "a penchant for keeping the money of others without render-

⁵ Although there is nothing in the constitution or statutes prohibiting an insane person from holding public office, and it is not so declared by the common law, nevertheless on grounds of public policy an insane person cannot hold public office (*Matter of Killeen*, 201 N.Y.S. 209, 121 Misc. 482).

ing services or account therefor" (*Louisiana State Bar Association v. Theard*, 62 So. (2) 504):

We quote from the above decision of the state court, at page 503, as follows:

"Incidentally, the peculations involved thousands of dollars belonging to his clients and others extending over a considerable period of time. In the petition, the charge has been limited to a single instance of forgery and uttering. However, counsel for respondent introduced in evidence newspaper clippings and other documents relative to the public scandal and agitation attendant to the discovery of respondent's embezzlements, forgeries and other breaches of trust, his arrest and subsequent incarceration in a sanitarium for mental diseases where he remained for a long time."

His first arrest came on August 4, 1936 as a result of an embezzlement charge by Georgine Denis Merrill,⁶ thus bringing to light these offenses. When he was brought to trial in the Criminal District Court for the Parish of Orleans on this Merrill charge on April 30, 1938, which was, of course, three years after the commission of the offense for which he was disbarred, he was adjudged "presently insane," which concerned only his then inability to defend himself or to assist his counsel in his defense. The state disbarring authority did not absolve him from the criminal consequences of an act of misconduct, and then subsequently deprive him of his live-

⁶ *State v. Theard*, 203 La. 1026, 14 So. (2) 824, involves Mrs. Merrill's transaction. While her name does not appear in the decision, the bill of information was filed on August 11, 1936, and her identity is made clear in *State v. Theard*, 212 La. 1022, 34 So. (2) 248.

lihood because of the commission of the same act. The state court, in the disbarment action, was concerned only with misconduct committed in 1935 and the Merrill criminal proceeding related in not the slightest degree to insanity at the time the Merrill alleged misconduct was committed, but to his mental condition which prevented his being brought to trial.⁷ Since petitioner now claims to have been insane at the time he committed all of these crimes, it is natural to suppose he would have pleaded insanity as the reason for the alleged embezzlement to the Merrill case, yet after the "insanity" impediment had been removed on May 11, 1944 in this very Merrill case, he was acquitted by a jury on his simple plea of not guilty, which precluded any jury finding that he was insane when the act occurred.

It is significant that, although on April 30, 1938 he contended he was unable to defend himself on the ground that he was then insane (which impediment was not removed until May 11, 1944),⁸ petitioner was before the District Criminal Court on March 29, 1943, the same day on which he was being hospitalized as an insane person,⁹ seeking to be dismissed from the Merrill charge on the ground that the state's failure to bring him to

⁷ Judges have nothing to do with the question of sanity or insanity at the time of the offense, because that is a question of fact on which depends the accused's guilt, which the jury alone must decide. The question of "present insanity" of a party accused of crime is a question which determines whether he is capable of defending himself, or of rendering assistance to the attorney or attorneys defending him. That question, of course, has nothing to do with the question of guilt of the party accused and is therefore a matter for the judges and not the jury to decide (*State v. Neu*, 180 La. 545, 157 So. 105, 115).

⁸ *State v. Theard*, 212 La. 34 So. (2) 248, 249.

⁹ Pet. brief, p. 7.

trial was barred by a three-year statute of limitations (*State v. Theard*, 203 La. 1026, 14 So. (2) 824)..

True, petitioner avoided further prosecution on the Phoenix Building and Homestead embezzlement charge (*State v. Theard*, 212 La. 1022, 34 So. (2) 248) because of the state's failure to timely bring him to trial, but he has never been adjudicated insane when these offenses were committed.

Patlak, infra, holds that a previous finding in a criminal case that an attorney was insane at the time he committed other misconduct was not *res judicata* in, nor did operate as an estoppel against, a disbarment hearing involving another offense committed at another time.

A finding by a judge in 1938 that petitioner was unable to defend himself against one criminal charge does not establish his insanity in 1935 when he committed the crime for which he was disbarred. The disbarring authority, state or federal, must decide on the evidence produced in a disbarment hearing whether an attorney was insane when he committed an act of misconduct, not on the conclusion of a *nisi prius* court, which may have dealt with entirely different evidence.

(3)

The state court ruling that insanity is no defense in a disbarment action is not unique, and petitioner can point to no authority to the contrary.

An annotation to the *Patlak* case will be found in 116 A.L.R. at page 632 where the editor properly notes that "no authority (except the dictum in the *Kennedy* case, 178 Pa. 232, 35 Atl. 955) has been found for regarding an attorney's insanity as being a mitigating circum-

stance." In the matter of *Manahan*, 186 Minn. 98, 242 N.W. 548, the court said that mental instability at the time of the offense does not justify the court in taking chances that, were he again permitted to practice, relapses might run during which clients in the future would suffer as in the past (116 A.L.R. 633).

The Louisiana doctrine, announced in both decisions dealing with petitioner,¹⁰ applied *Patlak*, 368 Ill. 547, 15 N. E. (2) 309, where the insanity at the time of the offense was conceded for the purpose of the holding. Of course, the testimony on that score was conflicting, just as it is here. *Patlak*'s sanity at the time of disbarment was furthermore admitted by the court. His defense was "that, at the time the respective transactions took place about which complaints were made and prosecuted, he was insane, hence he did not know what he did and cannot be disbarred for anything he did while he was insane," just as is petitioner's defense.

This contention was rejected and petitioner can point to no authority to the contrary.

(4) (5) (6) (7)

The state rule that insanity is no defense in a disbarment action is not so unreasonable or arbitrary as to offend any right protected by the Fourteenth Amendment.

The state court has so decreed, and the immediate issue is whether the holding is so offensive to due process that it will be denied recognition in the federal courts.

That the profession of law is one charged in the high-

¹⁰ *Louisiana State Bar Association v. Theard*, 222 La. 328, 62 So. (2) 501, and 225 La. 98, 72 So. (2) 310.

est measure with a public interest must be conceded.¹¹

Unlike members of the other professions, a lawyer is an officer of the judiciary,¹² he takes an oath to demean himself uprightly and according to law (S. Ct. Rule 5(4)), and he plays a sacred role in the administration of justice. The power to admit and disbar is essentially judicial,¹³ not legislative; statutes have been struck down which are in limitation, rather than in aid, of its experience. It is not too much to say that the peace and well-being of the state and nation depend upon a continued supervision of the practice of law. The public has almost as deep interest in the integrity and the independence of the bar as of the bench.¹⁴

It is in this atmosphere that the state court has removed petitioner from the rolls, by balancing on the one hand the devastating effect of his misbehavior on the judiciary, the legal profession—indeed on society itself—against on the other hand the loss of his status as a lawyer. Petitioner complains he did not know what he was doing, that his conduct was not wilful. The Supreme Court answers that the public must be protected against his activities in the practice of law whether or not he knew what he was doing (62 So. (2) 504). The same rule should be recognized in the federal courts.

¹¹ *Ex parte Burr*, 22 U.S. 529, 9 Wheat 529, 6 L.Ed. 152; *Booth v. Fletcher*, 101 F. (2) 676, cer. denied 307 U.S. 628, 59 S.Ct. 835, 83 L.Ed. 1511; *Ex Parte Wall*, 107 U.S. 265, 288.

¹² By statute in Louisiana, attorneys are characterized as public officers along with other persons connected with courts of justice, such as judges, advocates, clerks and sheriffs (*Art. 2447, Revised Civil Code*).

¹³ *Ex parte Secombe*, 60 U.S. (19 Haw.) 9, 15 L.Ed. 565; *Randall v. Brigham*, 74 U.S. 523, 7 Wall. 523, 19 L.Ed. 285.

¹⁴ *Cfr. Cammer v. United States*, 76 S.Ct. 456.

We understand this is but an application of the doctrine recognized by *Isserman*, 345 U.S. 286, 73 S. Ct. 676, 97 L. Ed. 1013, to which decision no allusion is made by petitioner.¹⁵ The attorney was disbarred in New Jersey because of his conviction by the Southern District of New York for contempt. Proceeding was brought here to disbar him (Rules S. Ct. Rule 2(5), 28 U.S.C.A.). To his claim that he had already been sufficiently punished, and that his total expulsion constituted vindictiveness, Your Honors replied:

“Such an attribute misconceives the purpose of disbarment. There is no vested right in an individual to practice law. Rather there is a right in the court to protect itself, and hence society, as an instrument of justice. That to the individual disbarred there is a loss of status is incidental to the purpose of the court and cannot deter the court from its duty to strike from its rolls one who has engaged in conduct inconsistent with the standard expected of officers of the court.”

The dissent in *Isserman* rejected a doctrine that conviction for contempt is *per se* a ground for disbarment, and indicated that the result might have been different if a conspiracy to impede the administration of justice were involved.

*Wieman v. Updegraff*¹⁶ dealt with the field of public education wherein the court, in considering the basic nature of the act denounced and its relation to the maintenance of high educational standards, concluded that it was arbitrary state action to oust a professor merely because of his refusal to swear that he had not been a

¹⁵ It was cited against petitioner below.

¹⁶ Cfr. *In re: Summers*, *supra*, which involved a lawyer's oath.

member of a subversive organization. If the state rule had provided that a teacher should be dismissed for **overt acts** involving moral turpitude, as in petitioner's case, the result might have been different. We detect nothing in *Wieman* or in the dissents in *Barsky, Adler*,¹⁷ and other decisions, to invalidate a rule that ousts a teacher, not for mere association, not because he thought differently than a transient majority, or even advocated an unpopular cause, but because he had been found guilty of **immoral deeds**¹⁸—not words—committed in the actual pursuit of his profession, notwithstanding he did not know what he was doing because of an emotional instability.

Whatever the rule is in the area of public education, in the field of the law Your Honors have said in *Isserman* that petitioner has no vested right and that the public interest is paramount. That he has no natural right to his license, nor is it a privilege or immunity in the constitutional sense was recognized in *Re: Lockwood*, 154 U.S. 116, 14 S. Ct. 1082, 38 L. Ed. 929.¹⁹ Louisiana's holding that petitioner, having been extended this high privilege with knowledge that he had no vested right in it and that the state could withdraw it under precepts calculated to protect society itself

¹⁷ *Adler v. Board of Education*, 342 U.S. 485, 72 S. Ct. 380; *United Public Workers v. Mitchell*, 330 U.S. 75, 67 S. Ct. 556, 91 L. Ed. 754.

¹⁸ *Meffert v. Packer*, 25 S. Ct. 790, 195 U.S. 625, 49 L. Ed. 350.

¹⁹ *Ex parte Garland*, 4 Wall. (71 L.S.) 333; *Bradwell v. Illinois*, 16 Wall. 130, 83 U.S. 130, 21 L. Ed. 442; *Ruckenrood v. Mullins*, 133 P. (2) 325, 102 Utah 548, 144 A.L.R. 387; *Watson v. Employers Liability*, 348 U.S. 65, concurring opinion of Mr. Justice Frankfurter; *Simmons v. Smith*, 149 F. (2) 869; *Starr v. State Board*, 159 F. (2) 305; *In Re: Thatcher*, 190 F. 969, 212 F. 801, appeal dismissed, 36 S. Ct. 450, 241 U.S. 644, 60 L. Ed. 1218; *People v. Baker*, 311 Ill. 66, 142 N.E. (2) 554, 31 A.L.R. 737; *In Re: Berkurtzk*, 323 Mass. 41, 80 N.E. (2) 45; *Matter of Keenan*, 314 Mass. 544, 546, 50 N.E. (2) 785.

from abasement and destruction, affords due process, although as a consequence of the necessity to protect the public he has suffered loss of status for offenses not wilful because of his alleged insanity.

Reliance is placed on three dissenting opinions in *Barsky* which condemned the expulsion of a New York physician for reasons non-existent here, where dissenting Justices found use of illegal evidence; conviction of a crime not involving moral turpitude by an agency with intermingled legislative-executive-judicial arbitrary power; and where Mr. Justice Frankfurter concluded a doctor's failure to produce books and records before a legislative committee bore no possible relation to his "fitness, intellectual or moral to pursue his profession," meaning, we assume, that the misconduct was not committed in the pursuance of his profession. An attorney goes far afield to assert that such language applies to forgery and embezzlement committed against his own client while actually representing her in the practice of law.

Civil liability may be imposed and rights may be disrupted without proof of actionable or wilful fault. The instances are many and varied. The determination of whether a State has taken property without due process consists in balancing the hardship placed on the individual on the one hand against the benefits which accrue to the public as a whole on the other hand (*State v. Marin*, 111 P. (2) 651, 17 Cal. (2) 699). The regulating authority in the field of law is at least as extensive, if no more so, than the police power. The state agency may for the general welfare of society impose obligations or responsibilities otherwise non-existent; and the creation of such liability even though imposed irrespective of fault is not violative of due process if it

rests on reasonable grounds of policy (*Chicago v. Sturges*, 222 U.S. 313, 32 S. Ct. 92, 56 L. Ed. 215; *Bisphan v. Mahoney*, 175 A. 320). Workmen's Compensation acts have been sustained even though they result in imposing liability without fault (*Cudahy Packing Co. v. Parramore*, 44 S.Ct. 153, 263 U.S. 418, 68 L.Ed. 316; *Mountain v. State of Washington*, 37 S.Ct. 260, 243 U.S. 219, 61 L.Ed. 685).

Although the rule is different in Louisiana, an insane person is liable for his torts at common law; the liability is in no way dependent upon the intent or design to commit the act (*Holdom v. Grand Lodge*, 159 Ill. 619, 43 N.E. 772; *Shedrick v. Lathrop*, 172 A. 630); an ordinance is constitutional which proscribes a visit to a place where gambling implements are exhibited, though it authorizes conviction for an innocent visit (*Ah Sin v. Wittman*, 25 S. Ct. 756, 198 U.S. 500, 49 L.Ed. 1142); a statute imposing liability for reasonable attorney's fees when payment of an insurance policy is wrongfully refused is valid, though the refusal is in good faith (*Life & Casualty Ins. Co. v. McCray*, 54 S. Ct. 482, 291 U.S. 566, 78 L.Ed. 787). A corporate insider may be disgorged of profits in shortswing transactions in securities irrespective of his intention when he entered the stock transaction (Sec. 16 (b) Securities Exchange Act of 1934, 15 U.S.C. 78 p. (b); *Smolowe v. Delendo Corp.*, 136 F. (2) 231, cert. denied 320 U.S. 751); absolute tort liability is not *per se* invalid as a deprivation of due process (*Prentiss v. National Airlines*, 112 F. Sup. 306; *Sandstrom v. California*, 189 P. (2) 17, 31 Cal: (2d) 401, 3 A.L.R. (2) 90, certiorari denied 69 S.Ct. 31, 335 U.S. 814, 93 L.Ed. 369); any loss resulting from such regulation is merely consequential (*Brown v. Warner*, 50 F. Sup. 593; *Pennsylvania v.*

Board, 81 A. (2) 28, 13 N.J. Super. 540, Affirmed 83 A. (2) 774, 8 N.J. 85).

(8)

The federal disbarring authority should require conclusive evidence of petitioner's present sanity, which was impliedly held immaterial in the state court.

There was no adjudication in the state court relative to petitioner's mental condition in 1952 when this action was filed. Apparently the court having rejected the defense of insanity, considered it immaterial that petitioner may have regained his sanity. The court relied on *Patlak* which conceded the attorney's present sanity, and which applied *Manaham* (Vide 116 A.L.R. 633), the latter decision holding that the court would not take chances on a relapse.

Petitioner says no one can question his complete recovery in body and mind or claim seriously and in good faith that he is not in every way competent and responsible to practice in the courts of the United States. For fear the Committee may be said to have acquiesced in these statements of fact, our duty compels us to say that there is substantial evidence to the contrary in the state proceeding, some offered by petitioner himself, not considered by the state court on account of the doctrine upon which the case was disposed of.

Assuming he relies on the present record, the following appears in his answer to this federal rule (R. 18):

"Appearer, Theard, with great industry has since 1948 practiced his profession, as quoted by the Supreme Court at p. 4 of its opinion without any

complaint levelled at his conduct.' " (Emphasis writer's)

Petitioner, in his application for rehearing in the Court of Appeals (p. 14) declares:

"When in 1948 appellant's health was completely restored and his civil interdiction lifted, appellant resumed active practice and, from 1948 to 1954, in addition to countless *nisi prius* cases, argued thirty-seven cases on appeal in the Supreme Court of Louisiana and in the Court of Appeal, for the Parish of Orleans (R. 26), as the Supreme Court of Louisiana notes 'without complaint levelled at his conduct.' " (Emphasis writer's)

From these declarations by petitioner, undoubtedly inadvertently made, it appears that the state court has found as a fact that, for the stated period, he has practiced law without complaint, whereas the language "without complaint levelled at his conduct" is petitioner's own language, contained in his own pleading in the state court and copied verbatim by the court. The decision of the Supreme Court of Louisiana contained in 72 So. (2) at p. 312 establishes this without doubt.

Petitioner's answer to the instant federal disbarment rule was filed on May 29, 1954. He alleged (R. 14) that he has recovered from his previous mental infirmity and his health is again entirely normal. No evidence under oath was offered by him to support these averments, petitioner being content to rely on decisions in the record (R. 19), showing his activities since his return to the practice in 1948. If this is proof positive

of his sanity, we need only refer to a similar list on pp. 23-24 of our appendix to demonstrate his intellectual and professional accomplishments during a time when he claims he was insane to fortify the Committee's contention throughout that he was never so bereft of reason that he did not know the difference between right and wrong.

Considering his solemn representations in this federal action of his complete insanity for a period of ten years, four months, and twenty-three days—from September 2, 1936 until February 25, 1947,²⁰ petitioner should have tendered more convincing proof of his present mental fitness if it is held to be an issue here. A bare statement by the state court (62 So. (2) 504) that his civil interdiction terminated on May 7, 1948 should hardly satisfy any disbarring authority that petitioner had regained the mental and moral attributes so necessary to the practice of law. A decree from a *nisi prius* court lifting his interdiction would evidence nothing more than his capacity to perform any act which any **layman** might perform.

Petitioner's admission that the true objective of disbarment is to protect the public, and not punish a lawyer,²¹ is a complete recognition of the doctrine of *Isserman* that he has no vested right in his license, and of the validity of the basic reasoning in the state court decision that insanity is no defense to a disbarment action. Under the doctrine of those decisions it is immaterial that he may be presently sane.

²⁰ Pet. brief, p. 7.

²¹ It is for this reason that lawyers are permitted to resign in certain instances (*Application of Harper*, S.Ct. Fla. 84 So. (2) 700).

(9) (10)

The state court holding that the disbarment action was not stale is conclusive, and presents no substantial federal question.

The state court gave petitioner every opportunity to show prejudice because of the period which elapsed before the action was taken. This he could not do. As petitioner did not resume the active practice until 1948, a disbarment action filed in 1952 is timely. At all events the state court gave cogent reasons²² for its policy, and petitioner has not shown the rule to be unreasonable or arbitrary. No federal question is present here, and there is no basis for applying a different rule in the federal courts in this case.

CONCLUSION

For these reasons this committee prays that the judgment below be affirmed or, in the alternative, that the cause be remanded to determine the issue of petitioner's actual insanity when the misconduct occurred as well as his mental condition when this federal disbarment rule was filed.

Respectfully submitted,

COMMITTEE ON PROFESSIONAL ETHICS
AND GRIEVANCES OF THE LOUISIANA
STATE BAR ASSOCIATION.

JAMES G. SCHILLIN,
Chairman.

²² *Louisiana State Bar Association v. Theard*, 62 So. (2) 504 and 72 So. (2) 314.

APPENDIX

The Supreme Court of Louisiana has exclusive jurisdiction in all disbarment cases involving misconduct of members of the bar, with the power to suspend or disbar under such rules as may be adopted by the court. There is no requirement that the misconduct shall be wilful (*Constitution of Louisiana, West's L.S.A. Constitution, Vol. 2, p. 63, Art. 7, Sec. 10*).

Under this constitutional rule making power the Supreme Court of Louisiana adopted comprehensive rules to govern "discipline and disbarment of members," which are fully contained in *West's L. S. A. Revised Statutes, Vol. 21, p. 377, et seq.*, providing it shall be the duty of the Committee to institute disciplinary action whenever "the member against whom the complaint has been made **has probably been guilty of a violation of the laws of the State of Louisiana relating to the professional conduct of lawyers and to the practice of law**, or of a wilful violation of any rule of professional ethics of sufficient gravity as to evidence a lack of moral fitness for the practice of law." As no law exists in Louisiana regulating the practice of law, or the professional conduct of a lawyer, as such, there is ample area for the interpretation, and the court may have well so concluded, that since petitioner confessed that he was "guilty of a violation of the laws of the State of Louisiana" denouncing forgery and embezzlement, proof of wilfulness was unnecessary. At all events the interpretation of its own rules was for the Louisiana court.

The procedural requirements of the rules were meticulously followed in petitioner's case. He was represented by competent counsel before the Committee, who cross-examined the witnesses, and the Committee's power of subpoena and otherwise were available to and utilized by him. Pursuant to the rules, a hearing was had before a commissioner, which were adversary in

every respect. He was represented by counsel before the Commissioner as well as before the Supreme Court, which rendered two opinions, one on exceptions (62 So. (2) 501), and one on the merits (72 So. (2) 310).

The rule relative to reinstatement of disbarred attorneys reads as follows (*West's L.S.A. Revised Statutes*, Vol. 21, p. 389) :—

“When a petition for reinstatement shall have been filed by a member disbarred from the practice of law by judgment of the Supreme Court, a copy thereof shall be served upon the secretary-treasurer of this association, and the committee, acting through one or more of their number, may appear in the proceeding either for the purpose of supporting or opposing said petition.”

* * * * *

L.S.A. C.C. Art. 2447: Sale of litigious rights:

“**Public officers** connected with courts of justice, such as judges, advocates, **attorneys**, clerks and sheriffs, can not purchase litigious rights, which fall under the jurisdiction of the tribunal in which they exercise their functions, under penalty of nullity, and of having to defray all costs, damages and interest.”

* * * * *

The record (R. 19) contains a list of thirty-six (36) cases argued by petitioner during the **six-year period** after his resumption of practice, that is, from May, 1948 until April 26, 1954, when his disbarment became final. He contends that such activity shows his complete restoration to health of body and mind.

This Wexler forgery occurred on January 2, 1935. If petitioner is correct in this respect, we point to the following list of seventeen (17) cases argued by him during the much shorter period of less than

two (2) years prior to his arrest in August, 1936, that is, from October, 1934 to June, 1936, as evidence of his intellectual competency and professional accomplishments. Yet during this period he says he was insane.

(1) *Cabral v. Victor and Provost*, 181 La. 139, 158 So. 821. This decision by the Supreme Court of Louisiana was rendered on October 29, 1934 and petitioner's application for rehearing was denied on November 26, 1934. This was only approximately one month before he forged the *Wexler* note on January 2, 1935. If his ability to prepare and argue cases is a criterion of his sanity he was sane then. Petitioner succeeded in obtaining a rehearing.

(2) *Treigle v. Acme Homestead Association*, 181 La. 941, 160 So. 637, decided March 4, 1935, rehearing denied April 1, 1935. This case involved some delicate constitutional questions on building and loan association law, petitioner being an expert in that field. Plaintiff succeeded in reversing the court below. He also appeared in the next four (4) companion cases, listed as (3), (4), (5) and (6):

(3) *Sokolsky v. Equitable Homestead Association*, 181 La. 970, 16 So. 646.

(4) *Treigle v. Thrift Homestead Association*, 181 La. 971, 160 So. 646.

(5) *Treigle v. Conservative Homestead Association*, 181 La. 972, 160 So. 647.

(6) *Mitchell v. Conservative Homestead Association*, 181 La. 973, 160 So. 648.

(7) *Goldsmith v. Parsons*, 161 So. 879, decision of the Court of Appeals for the Parish of Orleans, decided June 10, 1935. The matter was ably handled by petitioner.

(8) *Goldsmith v. Parsons*, 182 La. 123, 161 So. 175, decided February 4, 1935, rehearing was granted on petitioner's application.

(9) *Saia v. Phoenix Building & Homestead Association*, 182 La. 844, 162 So. 640, decided by the Supreme Court of Louisiana May 27, 1935, rehearing denied July 1, 1935.

(10) *Phoenix Building & Homestead Association v. Maloney*, 183 La. 547, 164 So. 410, Opinion November 4, 1935, rehearing denied December 2, 1935.

(11) *S. A. Calonge's Sons v. West Orleans Beach Corporation*, 164 So. 429, decision of the Court of Appeal for the Parish of Orleans December 16, 1935. Petitioner succeeded in reversing the judgment below.

(12) *Succession of Marion*, 183 La. 680, 164 So. 625, Supreme Court decision December 2, 1935. Motion was made to dismiss petitioner's appeal which was denied (See *Succession of Marion*, 163 La. 734, 112 So. 667).

(13) *Hymel v. Central Farms*, 183 La. 991, 165 So. 177, decided December 2, 1935.

(14) *Phoenix Building & Homestead Association*, 184 La. 783, 167 So. 441, decided March 30, 1936.

(15) *Morere v. Howard Odorless Cleaners*, 185 La. 130, 168 So. 709, decided April 27, 1936, rehearing denied May 25, 1936. Petitioner succeeded in reversing judgment below.

(16) *Harris v. Monroe Building & Loan Association*, 185 La. 289, 169 So. 343, decided April 29, 1935, rehearing June 30, 1936. Constitutional question was involved here.

(17) *Third District Land Company v. Geary*, 185 La. 508, 169 So. 538, decided June 30, 1936.